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April 4, 2006

**BY E-MAIL (gkuhlman@staff.abanet.org)
AND BY FIRST-CLASS MAIL**

George A. Kuhlman, Esquire
American Bar Association
321 N. Clark Street
Chicago, IL 60610-4714

Re: **Proposed Changes To The ABA Model Code Of Judicial Conduct**

Dear Mr. Kuhlman:

I write as a Past President of the Delaware State Bar Association to share concerns that I am hearing in Delaware with regard to certain proposed changes to the ABA Model Code of Judicial Conduct, as currently reflected in the Final Draft. I convey these concerns to you (and for whatever forwarding you deem to be appropriate) against a backdrop of Delaware judges and lawyers who have considered previously the ABA Commission's various drafts and are now preparing to consider whatever form of changes to the Mode Code that the ABA House of Delegates may ultimately adopt, so that, in turn, changes to the Delaware Judges' Code of Judicial Conduct (the "Delaware Code") can be considered.¹

¹ The current Delaware Judges' Code of Judicial Conduct was adopted and promulgated by the Delaware Supreme Court in 1993, after consideration of the then-current Delaware Judges' Code of Judicial Conduct, the ABA's 1990 Model Code, the 1992 Code adopted by the Federal Judicial Conference, preliminary and final reports of a special advisory committee of Delaware judges and lawyers, and other comments and suggestions received.

Certain of the proposed changes to the Model Code have no application to Delaware where, as you know, all of the judges are appointed. But the bulk of the proposed provisions will, if adopted within the respective states, have broad application to *all* judges whether appointed or elected. The concerns I am hearing in Delaware include the following:

1. **Global**, The proposed changes to the Model Code generally retain the proscriptive “shall” language contained in the 1990 Model Code. In contrast, the current Delaware Code uses the aspirational “should” language. The aspirational language is not intended to suggest that Delaware judges pay any less attention to the canons and rules. Rather, it is intended to strike a balance between articulating standards while at the same time not inviting judicial conduct complaints (some of which historically have been lodged for strategic or tactical reasons in connection with the underlying case).
2. **Rule 2.08(C) (Communications With Jurors)**. What is the basis for the seeming prohibition on a judge engaging with jurors in any substantive discussion of a case even when the case is indisputably *over* – for example, when there has been an acquittal in a criminal case?
3. **Rule 2.10(B) (Ex parte Communications)**. Doesn’t the prohibition against a judge “independently investigat[ing] facts in a case” go too far if it may have a chilling effect on a judge who otherwise would seek to develop a fuller understanding of the factual setting and, in turn, have a better ability to consider the evidence presented? And, if a concern develops with a judge having gone beyond the evidence in arriving at his or her decision, why is recourse to post-decision motions (for reconsideration, reargument, etc.) and/or to appeal not adequately protective of the litigants’ interests?
4. **Rule 3.04 (Affiliation With Discriminatory Organizations)**. Is the burden imposed on judges to determine whether an organization “practices invidious discrimination” a realistic one? Won’t it possibly have a chilling effect, further isolating judges from the communities they serve? And while a judge’s membership in a religious organization will not provide a basis for a violation of *this* rule, might not such membership serve as a basis for an effort to disqualify the judge pursuant to the avowedly open-ended provisions of Rule 2.12 if the impartiality of the judge is questioned? Likewise, might not membership in the religious organization serve as a basis for a claimed violation of Rule 4.01 (extrajudicial activities), to the extent the judge’s impartiality is questioned?

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Thank you for your consideration of these concerns, and please do feel free to pass them along as you may see fit.

Sincerely yours,



William D. Johnston

WDJ:emf

cc: The Honorable Myron T. Steele (myron.steele@state.de.us)
Charles G. Geyh, Esquire (cgeyh@indiana.edu)
W. William Hodes, Esquire (wwh@hodeslaw.com)